IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

Date of Decision: 14-11-1995.

CRIMINAL APPEAL NO. 853 OF 1987

For Approval and Signature:

THE HON'BLE MR. JUSTICE A.N. DIVECHA

And

THE HON'BLE MR. JUSTICE H.R. SHELAT.

1. Whether Reporters of Local Papers may be allowed to see the Judgment ?

2. To be referred to the Reporter or not ?

3. Whether Their Lordships wish to see the fair copy of Judgment ?

4. Whether this case involves substantial question of law as tothe interpretation of the Constitution of India, 1950 or any order made thereunder ?

5. Whether it is to be circulated to the Civil Judge?

Shri D.D. Vyas, Advocate for the appellant.
Shri S.R. Divetia, Additional Public Prosecutor for the respondent State.

Coram: A.N. Divecha,J. & H.R. Shelat,J.
(14-11-1995)

ORAL JUDGMENT: (Per: H.R. Shelat, J.)

Being aggrieved by the judgment and order dated 12th October 1987, passed by the then learned Sessions Judge-Bulsar at Navsari, in Sessions Case No. 24/87, convicting the appellant of the offence under Section 302 and 324 of the Indian Penal Code, and sentencing him for the offences under Section 302 to life imprisonment and passing no separate sentence for the offence under Section 324, the original accused-appellant has preferred this appeal.

2. Thakorbhai Lallubhai, Hemant Bhagwanbhai, and Hiteshkumar

Dayaljibhai Patel are the cousins, while the accused-appellant is their uncle. Ramilaben, the sister of Thakorbhai Lallubhai married Dhirubhai Bhikhabhai Patel. Both had settled at Sharjah. In the last week of November 1986 Dhirubhai Bhikhubhai had come to India and was available at Malvan, his native place. Thakorbhai Lallubhai wanted to see his brother-in-law. He and Hemantkumar Bhagwanbhai on 1-12-86 decided to go to Dhirubhai Bhagwanji Patel at Malvan on 2nd December 1986. They also decided to meet in bazaar at Untdi. Thakorebhai was to arrive at Untdi from his place of work. In the evening of 2nd December 1986, both met at the place agreed upon, i.e., rendezvous and then on cycle went to Malvan to see Dhirubhai Bhikhabhai Patel. At 8.15 p.m., they returned back to Untdi. Hemantkumar Bhagwanbhai was in hurry to go back to his place because of gripe or collywobbles. Thakorbhai Lallubhai then asked him to go saying that he would be following him taking his tiffin-box. Thakorbhai Lallubhai after taking his tiffin-box was going to his house by the road called Untdi-Village to Dipi Falia Road. On the way near primary school he found that the accused-appellant and Hemantkumar Bhagwanbhai were altercating and both were reviling. He inquired what the matter was. Each then found fault with the other saying that the other one hit his cycle to his cycle. Thakor then tried to pacify both saying that owing to the dark event of such collision might bonafide occur. Bhikhubhai,the implacable appellant then got wild and feeling anguished and offended he took out a knife from his pocket, and a gave blow to Thakorbhai Lallubhai which landed on the left shoulder. Thakorbhai sustained bleeding incised injury. Hemantbhai then tried to rescue. The appellant then gave three knife blows; as a result Hemantbhai sustained fatal injuries namely, (1) Incised wound over supra-claricular fossa on left side which was above down ward from lateral to medial size 1 x 1 x 1 cm; (2) Incised wound over left axillary fold and lateral border of left scapula size 1 x 1 cm., active bleeding from wound strait in direction; and (3) Incised wound over R. Medial border of scapula near 4th thoracic size 1 x 1 cm and direction is above down ward from lateral to medium. He then fell down. Thakorbhai Lallubhai who was aghasted, went to the place of Dayalji Devabhai his uncle to inform. Dilip,and Hitendra the sons of Dayalji and Dhanuben, the wife of Dayalji were present. He informed about the incident and all the four went to the scene of offence where they found Hemant lying in wounded condition and was no more. At that time, Jayeshbhai Thakorbhai Joshi was passing by riding over his Rajdoot. He was requested to inform concerned persons in Dipi Falia. Thereafter, Thakorbhai was taken to Dungri for medical treatment, but as the Doctor was not available he was taken to Bulsar where he lodged the complaint and also took medical treatment. He was hospitalised and discharged on 8th December 1986. The police officer of the Bulsar Rural Police Station investigated into the offence. At the conclusion of the investigation, the charge-sheet against the appellant before the

Court of the Additional Chief Judicial Magistrate at Bulsar came to be filed. As he was having no jurisdiction to hear and decide the case, the learned Magistrate committed the case to the Court of Sessions at Navsari. The case was then registered as Sessions Case No. 24 of 1987. The then learned Sessions Judge kept the case with him for hearing and disposal in accordance with law. A charge was framed against the appellant at Exh.1 to the effect that on 2-12-1986 at 20-30 hours at Untdi on the road leading to Dipi Falia near Primary School with the intention of causing injuries sufficient in the ordinary course of nature to cause death, gave knife blows and inflicting fatal injuries intentionally caused the death of Hemant and voluntarily caused hurt to Thakorbhai by knife, the instrument for cutting or stabbing etc., and committed the offences under Sections 302, 324 Indian Penal Code and Sec. 135 of Bombay Police Act. Knowing about the allegations levelled against him, the appellant pleaded not guilty and claimed to be tried. The prosecution then examined 14 witnesses and produced documentary evidence, along with panchnamas, certificate of the Doctor, P.M. Note etc. Appreciating the evidence before him, the then learned Sessions Judge,Navsari, convicted the appellant as aforesaid but acquitted him of the offence punishable under Section 135 of the Bombay Police Act. The appellant, who came to be convicted, has preferred this appeal assailing the judgment and order of the lower Court.

3. Mr. D.D. Vyas, the learned Advocate representing the appellant, submitted that the learned Judge below committed the error in reaching to the conclusions against the accused-appellant and convicting him. There was no sufficient material on record justifying the conviction. The learned Judge below overlooked the inimical relations, and appreciated the evidence wholly against the sound principle of law. He then pointed out what were the errors committed by the learned Judge. Against such submission, Mr. Divetia, the learned Additional Public Prosecutor for the respondent submitted that no error was committed. The order of conviction was in all respects quite consistent with the law and evidence on record. The testimony of the eye witness and other witnesses was rightly accepted by the learned Judge and there was no justification to upset the findings as well as order of the learned Judge below.

4. Here in this case, 14 witnesses are examined, but the evidence of Thakorbhai Lallubhai who is the only eye witness is material which is rigorously assailed by the learned Advocate representing the appellant. When the case mainly hinges upon the evidence of Thakor Lallubhai recorded at Exh.6, the same requires to be scanned. Before we do so, we will be in brief referring the evidence of other concerned witnesses whose evidence is to some extent relevant. Jayeshbhai Thakorbhai Joshi does not throw light much on the incident because he was not the eye witness.

His evidence (Exh.14) shows that when he was passing riding over his Rajdoot he saw Hemantkumar lying on the ground injured. Kushalbhai Chhotubhai (Exh.22) has merely stated that the appellant had been to his place soon after incident for water. While giving a glass of water, he could see that there was injury on right little finger of the appellant and his clothes were bloods-stained. The doctor performing the post mortem and giving treatment both to the appellant and Thakorbhai Lallubhai is examined at Exh.13. From the evidence of these witnesses, what can be deduced is that some incident took place wherein accused-appellant, Thakorbhai and Hemantbhai, were injured and Hemantbhai lost the life. Who did the wrong cannot be spelt out from the evidence of these witnesses and for that the evidence of Thakorbhai Lallubhai is required to be looked into.

5. It has been submitted on behalf of the respondent that the Court can convict the accused only on the testimony of one witness, for quality was material and not the quantity. We do not dispute the principle of law that only on the evidence of a single witness the accused can be convicted, provided the evidence of that witness is credible i.e., free from doubt, appeals to the conscience of the Court, and leads to the guilt of the accused positively. No doubt, Thakorbhai Lallubhai has narrated the incident accounting in full and has thereby supported the case of the prosecution - respondent; but we see no good reason to unflinchingly rely upon the same.

6. Bhaghubhai Master had bred the belief alike others that Kamuben in the village was a witch. As such ill-based notion and vagary was looming large over the concerned, the betrothal of Parvatiben was broken. Consequently, the family owing to the resultant rift came to be divided into two rival groups, Bhaghubhai, Thakorbhai, Hiteshbhai Dayaljibhai and others have formed one group, while the appellant, Kamuben and others the opposite group. Both the groups were inimical to each other, and that fact has been admitted by Thakorbhai Lallubhai and Hitesh Dayaljibhai. Parvatiben is still unmarried and therefore the bitterness instead of being gradually slaked, it has rapidly aggravated, making every one to hover for retaliation. Thakorbhai Lallubhai has admitted in his cross-examination that he does not have speaking terms with his uncle the appellant because his father and the appellant are having inimical terms. He is also interested in seeing that appellant is convicted, ofcourse making it clear that despite the enmity he was telling the truth. When from the evidence of Thakorbhai Lallubhai vitriolic aspect emerges and each considers the other one to be the arch-rival, we would be slow in accepting the evidence of Thakorbhai unless his evidence is found free from doubt and certainly appealing leaving no possibility of the appellant's innocence. We are mindful about the law that enmity cannot always damage the prosecution, it cuts both the ways, one may

tell the truth, or a lie. The prosecution has therefore in such cases eliminate the possibility running counter to its say, or likely to impair its case, and show that evidence of the witness is speckless. If that is not done, or necessary materials eliminating the same are not available from the facts on record, the Court will be cautious and slow in placing reliance, it will weigh the evidence of such witness with stinginess, and the Court will insist on independent corroboration. On query, therefore, Mr. Divetia, the learned Additional Public Prosecutor representing the respondent submitted that Hitesh Dayalji was corroborating Thakorbhai Lallubhai obliterating the question marks. No doubt, Hitesh Dayalji after Thakor Lallubhai informed him at his place, went to the place of offence along with Thakorbhai and saw Hemant Bhagwanbhai lying on the ground in wounded condition, and on further check-up it was found that Hemant was no more. But Hiteshbhai cannot and certainly does not testify as to who assailed first and who caused injury to Hemantbhai and how because he was not a witness to the incident. His evidence therefore cannot be said to be a corroborating evidence with regard to the assailant and the manner in which the incident happened.

7. It has been suggested in the cross-examination before the lower Court that Thakorbhai Lallubhai and the deceased Hemantbhai had gone to Malvan to see the brother-in-law of Thakorbhai who had come back to India from abroad for some time. At the time of the visit they were drunk and had turned indiscreet and discommodious to the other one. On way back both having reached to tumultuous state, became fratricidal and caused the injury to the other one; and to screen oneself from the liability, a false case involving the appellant was engineered. Even if it is believed that the defence is got up and is far from truth,the prosecution has to eliminate the possibility of feud-vendetta, the enervating factor and prove the case beyond reasonable doubt which is not done. The prosecution is hence left in the lurch.We will, however scrutinize the evidence of Thakorbhai Lallubhai with care and caution from other angles too.

8. It seems, Thakorbhai Lallubhai was very anxious to have the medical treatment first, rather than going to the police station for lodging the complaint. He therefore went to the doctor at Dungri but the doctor was not available. He therefore went to Bulsar. After going to Bulsar he did not go to the hospital, but straightway went to the police station and lodged the complaint though he was anxious about the medical treatment and certainly he must be because he was having bleeding injury and one would not know how the things would develop. The fact that he goes to the police station first despite his anxiety about the medical treatment raises a doubt because of his conduct. If at all he was keen to have the complaint being lodged before the police station earlier, the outpost at Dungri

was there on the way. He could have gone there and lodged the complaint, but he did not go to that outpost and straightway went to Bulsar. His such conduct also leads us to believe that under the guise of medical treatment he was deliberating with the members of his group what to do and how to do and who should be implicated; and after setting well in mind he lodged the complaint involving the appellant. Such possibility cannot be ruled out.

9. Looking to the first abovestated injury on the person of the deceased, it can be assumed that there must be profuse bleeding, and the assailant because of the length of the pen knife must be very close to the deceased. The clothes of the appellant therefore must have been blood-stained to a little extent if not extensively. The C.A.ought to have marked the blood stains of deceased's blood. It may be stated that the blood-stains on the clothes of the appellant were found, and that factor has influenced much to the learned Judge below in reaching to the conclusions against the appellant; but that cannot be maintained being erroneous. The report of the Chemical Analyser reveals that the blood group of the blood-stains found on the clothes of appellant was 'B' and the appellant's blood group is also 'B'. It may be recollected at this stage that accused-appellant was also injured. The doctor treated him because of the injury on his little right finger. Because of that injury also, the blood-stain of 'B' group came to be noticed on the clothes of the appellant. The blood group of the deceased is 'A' and no such blood-stain could be seen by the laboratory while analysing the appellant's clothes sent to it. Absence of such blood-stains, therefore, leads us to think twice about the bonafides of Thakorbhai Lallubhai.

10. At the hearing distance there is a locality called Dipi Falia where people reside. It is made clear in the evidence of Vithalbhai Nanabhai Patel that if some one shouts remaining from the place of the incident the persons of Dipi Falia would hear especially because it was a winter-night. Thakorbhai Lallubhai did not shout for help although Hemant was breathing last. His such conduct coupled with above discussed factors,in our view, raises suspicion.

11. On the right little finger of the appellant the Doctor found injury which can be caused by a sharp cutting instrument. How the appellant came to be injured if at all he was the assailant is a point not made clear by the prosecution. It was dark and at that time perhaps Thakorbhai might not have noticed the injury on the appellant's person, but on the next day or thereafter he came to know. He however did not explain before the lower court. This aspect of the case coupled with above stated facts leads us to agree with the appellant's learned Advocate that how the incident took place has been suppressed so

that he might not have to go through fire and water.

12. If the weapons or thing used are not found out by the investigating authority, it can never be a ground to throw the prosecution's case overboard. But if the prosecution comes with the specific case that because of the particular muddamal weapon before the Court, the injury has been caused, the same has to be established and if the prosecution fails to prove that aspect, it would discredit the truth of the case if nothing else cogent, supporting the case is there on record. When the muddamal knife was shown to the Doctor, about the possibility of the injuries, he made it clear that the injuries he noted no doubt could be caused, but no clear cut marks which he saw would appear. He found irregular and rough borders of the injuries on the person of the deceased instead of clearcut which would go to show that by another weapon, may be sharp cutting, the injury was caused to the deceased and Thakorbhai, but certainly not with the muddamal knife said to have been possessed by the appellant. Who was having that weapon; with which the injury noted by the Doctor could be caused, whether particulars thereof were available, where the same could possibly be are shrouded in mistery and therefore, there is a reason to accept the appellant's submission that the origin is suppressed, some one else did the wrong, or the wrong was done by Thakorbhai himself.

13. Facing with such situation, Mr. Divetia, the learned Additional Public Prosecutor representing the respondent, then emphasised much on the discovery of the muddamal knife at the instance of the accused-appellant.No doubt,the accused-appellant in the presence of the panchas, and Investigating Officer pointed out the knife, about which the police says that the blood-stains having blood group 'A' could be noted thereon. But that aspect of the case will not help the prosecution. It is made clear by the Investigating Officer, whose evidence has been recorded at Exh.34, that the place from where the knife was found was a place accessible by all. It was a bush on the border of the field. If that is so, whether the appellant-accused can be fastened with the liability has to be determined. A similar question arose before the Supreme Court in the case of Trimbak vs. The State of Madhya Pradesh, A.I.R. 1954 Supreme Court, 39, wherein it is held "when the field from which the ornaments were recovered was a open one and accessible by all and sundry, it is difficult to hold positively that the accused was in possession of the articles. The fact of recovery by the accused is compatible with the circumstance of somebody else having placed the articles there and of the accused somehow acquiring knowledge about their whereabouts and that being so, the fact of recovery cannot be regarded as conclusive proof that the accused was in possession of the articles" and consequently the accused cannot be fastened with the liability. In another case between Lacchhman Ram vs. State of Orissa, A.I.R. 1985 S.C. 486,the same principle is

reiterated, ofcourse that principle is not found applicable to the facts of that case. This Court in the case of Narsinhbhai Dahyabhai Vaghela vs. State, XXXV (1) GLR 118, reiterated the same principle. In another case between Dudh Nath Pandey vs. State of U.P., AIR 1981 S.C. 911, while dealing with the question of recovery of pistol in murder case, the Supreme Court has held "Evidence of recovery of the pistol at the instance of the accused cannot by itself prove that he who pointed out the weapon wielded it in offence. Where the statement accompanying the discovery is woefully vague to identify the authorship of concealment, the pointing out of the weapon may at best prove the accused's knowledge as to where the weapon was kept." Here in the case on hand as made clear by the Investigating Officer at the most knowledge of the appellant can be said to have been proved and not the possession or the role alleged to have been played at the time of the incident. In view of such law made clear by the abovestated authorities, and situation of the place wherefrom knife is found the contention must fail.

14. One more point casting doubt on the testimony of Thakorbhai Lallubhai cannot be overlooked. Soon after the incident Thakorbhai goes to the place of his uncle Dayaljibhai Devabhai. On the way there is a house of the police patel. Ordinarily in the village, even if a person is illiterate and rustic, knows that if some wrong is committed, the police patel is required to be informed provided he is available. Though on way the house of the police patel is there Thakorbhai while going to the place of Dayaljibhai Devabhai does not inform the police patel. He has taken no care to explain why; which would go to show that he wanted to have his story improved or developed which would be found suitable later on. Thakorbhai has also on being questioned by the Doctor remained silent and has not given the name of the assailant and that aspect of the case, ofcourse not alone, but coupled with the abovestated factors, casts the doubt. We therefore find that his testimony cannot be free from reasonable doubt or animosity. When the evidence of Thakorbhai thus, tainted with several doubts discrediting the truth of his case, the prosecution ought to have led independent cogent evidence satisfying the conscience of the Court which has not been done, and therefore we are not inclined to place any reliance on the evidence of Thakorbhai. The possibility of the same having been tainted with improvements cannot be ruled out. When that evidence is kept aside, there is no other evidence on record going to show that the appellant was the assailant; he caused the injuries and Hemantbhai sustaining the injuries, succumbed to the same,and Thakorbhai also sustained the injuries because of the blow from the appellant. In our view, therefore, the learned Judge below fell into error in accepting the evidence of Thakorbhai and convicting and sentencing the appellant as aforesaid.

15. In the result, the appeal requires to be allowed and conviction and sentence inflicted require to be set aside. Consequently, the appeal is hereby allowed. The judgment and order of the lower court convicting the appellant of the offences under Section 302 and 324 of the Indian Penal Code are hereby set aside, and appellant is acquitted of the same. The appellant be set at liberty forthwith if not required in any other matter. The muddamal shall be disposed of as per the order of the lower court.

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